Nos. 04-1034 and 04-1384

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

JOHN A. RAPANOS; JUDITH A. NELKIE RAPANOS; PRODO, INC.; ROLLING MEADOWS HUNT CLUB; And PINE RIVER BLUFF ESTATES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JUNE CARABELL, et al.,

Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMERICAN PLANNING ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Clean Water Act prohibition on unpermitted discharges to "navigable waters" extend to non-navigable wetlands that do not even abut a navigable water?

2. Does extension of Clean Water Act jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters, no matter how tenuous or remote the connection, exceed Congress' constitutional power to regulate commerce among the states?

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INTEREST OF *AMICUS CURIAE*[1]

The American Planning Association ("APA") is a nonprofit, public interest and research organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels – including land use, economic, and social planning. The APA resulted from a merger between the American Institute of Planners, founded in 1917, and the American Society of Planning Officials, established in 1934. The organization has 46 regional chapters and 19 divisions devoted to specialized areas of planning, including the Environment, Natural Resources and Energy Division, which promotes the adoption of scientifically sound and effective policies to promote protection of the environment and the wise and sustainable use of natural resources and energy. The APA represents more than 38,500 professional planners, commissioners, and citizens involved in formulating and implementing planning policies and land-use regulations.

The APA has submitted *amicus curiae* briefs in many landmark cases of importance to the planning profession, including: *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *Yee v. City of Escondido*, 503 U.S. 519, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886,

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

120 L.Ed.2d 798 (1992); *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999); *Palazzolo v. Rhode Island*, 533 U.S. 606, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002); and most recently in *Kelo v. City of New London*, 125 S.Ct. 2655, 73 USLW 4552, 162 L.Ed.2d. 439 (2005); *Lingle v. Chevron*, 125 S.Ct. 2074, 73 USLW 4343, 161 L.Ed.2d 876 (2005); *City of Rancho Palos Verdes v. Abrams*, 125 S.Ct. 1453, 73 USLW 4217, 161 L.Ed.2d 316 (2005); and *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S.Ct. 2491, 73 USLW 4507, 162 L.Ed.2d 315 (2005).

As the need arises, the APA develops policy guides that represent the collective thinking of its membership on both positions of principle and practice. Such policies are developed through a strenuous process that involves examination and review by both the chapters and divisions of APA. In April 2002, the Policy Guide on Wetlands was ratified by the Board of Directors. *Available at* http://www.planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

STATEMENT OF THE CASE

Amicus American Planning Association adopts the statement of the case as set forth by Respondent.

SUMMARY OF ARGUMENT

At the heart of Petitioners' position, and the amici that support them, is their desire to escape the jurisdictional requirements of the Clean Water Act in order to avoid the regulatory oversight needed to protect wetland resources. While this position may be consistent with the immediate and short-term needs of the current property owners, it is short-sighted and in conflict with the public interest and the needs of society in the long-term.

Wetlands are complex and critical resources which should be protected, enhanced and restored, where feasible, in order to increase the quality and quantity of the nation's wetland resource base. The American Planning Association supports the goal of no net loss of the nation's remaining wetlands. This goal requires reasonable regulatory oversight of activities which may impact wetlands and a broad interpretation of "navigable waters" to include isolated and non-navigable waters.

Although voluntary wetland conservation efforts are commendable and should be encouraged, they cannot replace regulatory oversight and permitting processes. Effective planning must engage and inform the public and property owners about the importance of wetland protection. In addition to the important incentive programs that encourage property owners to conserve wetlands, there are a number of regulatory mechanisms that can successfully address the goal of wetland protection in the context of growth and development.

ARGUMENT

I. Wetlands Are A Critical Natural Resource In Need Of Protection

The great naturalist and writer Aldo Leopold eloquently explained in his essay "The Round River":

> If the land mechanism as a whole is good, then every part is good, whether we understand it or not. If the biota, in the course of aeons, has built something we like but do not understand, then who but a fool would discard seemingly useless parts? To keep every cog and wheel is the first precaution of intelligent tinkering.[2]

Wetlands are perhaps the most over-worked, undervalued and least understood and appreciated natural resource on the planet. In their natural state, they perform ecological functions which are vitally important to the environment and economic health of the nation and are impossible or costly to replace.[3] From flood protection, erosion control, storm water absorption, filtering of sediment and pollutants, aquifer recharge, fish and wildlife habitats, carbon sinks, and open space – wetlands are unsurpassed in their ability to moderate the damaging impacts from human activities and development.[4]

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[2] Leopold, Aldo, *The Round River*, Luna B. Leopold, ed. ROUND RIVER: FROM THE JOURNALS OF ALDO LEOPOLD, Minocqua, WI: Northwood Press, 1991.

[3] *See*, Bates, Sarah F., David H. Getches, Lawrence J. MacDonnell, Charles F. Wilkinson, SEARCHING OUT THE HEADWATERS – CHANGE AND REDISCOVERY IN WESTERN WATER POLICY, Island Press, 2003.

[4] *See*, Noss, Reed F., and Allen Y. Cooperrider, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY, Island Press, 1994.

Planners have an important role and responsibility in protecting wetlands. They help the public and elected officials understand the importance of the wetland resources; they assist in the preparation of community plans which balance the rights of the property owner with the needs of the community-at-large and the natural environment; they understand the multitude of land use tools available and prepare appropriate local regulations to implement the adopted plans; they help the property owner and developer navigate through the oftentimes complex regulatory world involved in wetlands protection; they continually reassess the effectiveness of their plans and land use tools; and they engage in public planning processes to update and amend the plans and regulations. Is protection of our nation's wetland resources worth this effort? The American Planning Association believes it is, because all wetlands, including isolated wetlands, perform valuable ecological functions.

Wetlands protect the quality of surface waters by retarding the erosive forces of moving water. They provide a natural means of flood control, protecting against the loss of life and property. The catastrophic flooding in New Orleans heightened the public's awareness of the critical role of wetlands as a natural approach to flood control. Wetlands improve water quality by intercepting and filtering out waterborne sediments, excess nutrients, heavy metals and other pollutants. Wetlands hold enormous amounts of carbon and thus are important in regulating climate as well as recycling carbon.[5]

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[5] Daniels, Tom and Katherine Daniels, THE ENVIRONMENTAL PLANNING HANDBOOK FOR SUSTAINABLE COMMUNITIES AND REGIONS, Planners Press, American Planning Association, 2003, at 229.

They act as a buffer between land and waterways, and stabilize shorelines. They remove significant amounts of biological oxygen demand (BOD), which leaves more oxygen available for fish and wildlife.[6] By acting as reservoirs or sponges, wetlands accumulate and then slowly release the water they retain, either into streams and rivers or into groundwater to recharge aquifers. This process is especially helpful in maintaining water supplies during times of drought.[7]

Wetlands are also sources of food, shelter, essential breeding, spawning, nesting and wintering habitats for fish and wildlife. These include migratory birds, endangered species and commercially and recreationally important species. By some estimates wetlands are worth tens of thousands of dollars per acre each year for the environmental services they perform.[8]

At the time of the nation's settlement, wetlands represented approximately 221 million acres of the land area in the lower 48 states.[9] By 1997, only 105.5 million acres remained, leaving just 47.7% of the original wetland acreage.[10] Wetlands now occupy about 5.5% of the land surface of the lower 48 states. Three-fourths of the remaining wetlands in the continental United States are privately

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[6] *Id.*

[7] *Id.*

[8] Maltby, Edward, WATERLOGGED WEALTH: WHY WASTE THE WORLD'S WET PLACES? Washington, DC: International Institute for Environment and Health, 1986.

[9] Dahl, T.E., 2000, STATUS AND TRENDS OF WETLANDS IN THE COTERMINOUS UNITED STATES 1986-1997. U.S. Department of the Interior, Fish & Wildlife Service, Washington, D.C.

[10] *Id.*

owned and only about 0.5% of these are under some form of conservation protection.[11]

Wetland losses have varied over time.[12] Between the mid-1950s and the mid-1970s, about 11 million acres of wetlands were lost, while 2 million acres of new wetlands were created – an annual loss of approximately 458,000 acres.[13] The net loss of 9 million acres of wetlands in those 20 years was about twice the size of New Jersey. More recently, between 1986 and 1997, the estimated total net loss of wetlands was 644,000 acres or 58,500 acres each year.[14] This significant decline in the rate of wetland loss

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[11] Burke, David, Eric Meyers, Ralph Tiner, Jr. and Hazel Groman. *Protecting Non-Tidal Wetlands.* Chicago: APA, PLANNING ADVISORY SERVICE, Report Number 412/413, 1988.

[12] The first conservation-oriented wetland survey was conducted during the mid-1950s by the U.S. Fish and Wildlife Service (FWS) (1956). In 1974, the FWS launched the National Wetlands Inventory (NWI), a massive project to classify and map virtually all the nation's wetlands. . . . The NWI has estimated total wetlands in the early 1980s to be about 99 million acres in the contiguous states, of which 93.7 million were inland freshwater wetlands and the rest coastal. This acreage represented a loss since the mid-1950s of approximately 14.8 million acres of freshwater wetlands and 482,000 acres of saltwater wetlands. (Frayer et al. 1983).

Platt, Rutherford, H., LAND USE AND SOCIETY – GEOGRAPHY, LAW, AND PUBLIC POLICY, Island Press, 2004.

[13] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *See*, http://www. planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

[14] *Id.*, citing STATUS AND TRENDS OF WETLANDS IN THE CONTERMINOUS UNITED STATES 1986-1997. http://training.fws.gov/library/Pubs9/wetlands86-97_highres.pdf [last accessed January 10, 2006] U.S. Fish and Wildlife Service (2000). *See also*, Sibbing, Julie M., *Nowhere Near No-Net-Loss*, National Wildlife Federation. *Available at* http://www.cwn.org/cwn/

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can be attributed, in large part, to the "Swampbuster" provisions in the 1985 Food Security Act and agricultural set-aside programs which accounted for a significant reduction of lands converted to agricultural uses.[15] Between 1986 and 1997, urban development accounted for an estimated 30% of all losses, with agriculture responsible for 26%, silvicultural activities 23% and 21% attributed to rural development.[16] Isolated, non-navigable wetlands are perhaps most vulnerable to the pressures of development because of their location and the relative ease of altering, dredging and filling these particular wetlands.[17]

Twenty-one states have lost more than half of their original wetlands.[18] In the major farming states of California, Illinois, Iowa, Missouri, and Ohio, roughly nine-tenths of the original wetlands are gone, mostly to cropland.[19] About 100 million acres of wetlands remain in the United States, of which about 20 million acres are isolated wetlands and are not part of navigable waterways.[20]

Isolated wetlands have important functional values that warrant protection – stormwater management, water

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files/Nowhere_Near_No-Net-Loss.pdf [last accessed on January 6, 2006].

[15] *Id.*

[16] *Id.*

[17] *See, e.g.*, Daniels, Tom and Katherine Daniels, THE ENVIRONMENTAL PLANNING HANDBOOK FOR SUSTAINABLE COMMUNITIES AND REGIONS, Planners Press, American Planning Association, 2003; McElfish, James M., Jr., NATURE-FRIENDLY ORDINANCES, Environmental Law Institute, 2004; Noss, Reed F. and Allen Y. Cooperrider, SAVING NATURE'S LEGACY: PROTECTING AND RESTORING BIODIVERSITY, Island Press, 1994.

[18] Daniels, *supra* note 5 at 230.

[19] *Id.*

[20] *Id.*

quality improvement, and wildlife habitat. Removing isolated, non-navigable wetlands from the jurisdiction of the Clean Water Act[21] will result in the loss of critical wetlands across the country.[22]

Thirty-five years ago, Ian McHarg – a teacher, planner, and landscape architect – wrote the seminal book on connecting the built and natural environments in a sustainable fashion. DESIGN WITH NATURE remains in the curriculum of every first-year planning student today.[23] Professor McHarg understood the tension between man and nature as few had before him.[24] He also appreciated the interconnectedness of natural systems.

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[21] 33 U.S.C. § 1251-1376.

[22] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *Available at* http://www.planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

[23] Ian L. McHarg, *Design with Nature*, Doubleday & Company, Inc., Garden City, New York (1969). "Ian McHarg died in 2001 at the age of 80. His brilliance was recognized world-wide, and he went on to be rewarded with the Harvard Lifetime Achievement Award, the National Medal of Art, the Thomas Jefferson Foundation Medal in Architecture, and 12 other international medals and awards, including the very prestigious Japan Prize in City and Regional Planning." *Available at* http://www.upenn.edu/gazette/0501/mcharg.html.

[24]

> If the highest values in a culture insist that man must subdue the earth and that this is his moral duty, it is certain that he will in time acquire the powers to accomplish that injunction. It is not that man has produced evidence for his exclusive divinity, but only that he has developed those powers that permit the fulfillment of his aggressive destructive dreams. He can now extirpate great realms of life: he is the single agent of evolutionary regression.

Id., at 26.

> A single drop of water in the uplands of a watershed may appear and reappear as cloud, precipitation, surface water in creek and river, lake and pond or groundwater; it can participate in plant and animal metabolism, transpiration, condensation, decomposition, combustion, respiration and evaporation. This same drop of water may appear in considerations of climate and microclimate, water supply, flood, drought and erosion control, industry, commerce, agriculture, forestry, recreation, scenic beauty, in cloud, snow, stream, river and sea. We conclude that nature is a single interacting system and that changes to any part will affect the operation of the whole.
>
> If we use water as an indicator of the interaction of natural processes, we see that the forests felled in the uplands may have an identical effect upon the incidence of flood that is accomplished by filling estuarine marshes. Pollution of groundwater may affect surface water resources and vice versa; urbanization will affect the rate of runoff, erosion and sedimentation, causing water turbidity, diminution of aquatic organisms, and a reduction in natural water purification. These, in turn, will result in channel dredging costs, increased water treatment costs, and, possible, flood damages and drought costs.

Id., at 56.

The best way to protect wetland resources is to identify them in plans and develop mechanisms to avoid adverse impacts.[25]

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[25] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *Available at* http://www.

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II. "Waters Of The United States" Must Be Defined Broadly In Order To Achieve The Federal Goal Of No Net Loss

With the wetlands resource base continuing to disappear, comprehensive resource planning is essential for laying the foundation to coordinate permitting programs and to save these resources. We need to focus our efforts in that direction, rather than to continue to litigate over what qualifies as a wetland. This Court can provide much-needed clarity and confirm that isolated wetlands are included so that we can get on with the important work of protecting these resources and fulfilling the "no net loss" goal.

Since much of the wetlands litigation in recent years has focused on what does, or does not, qualify as "navigable waters" and "waters of the United States" under the CWA,[26] it is fair to say that both the private and public sectors would benefit from some much-needed clarity in defining what qualifies as jurisdictional waters, particularly for non-navigable tributaries, such as ephemeral

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planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005]. Replacement of existing wetlands should be considered only after avoidance and minimization of wetland impacts and only where the wetland function in-kind can be replaced within the same sub-watershed.

[26] *See, Solid Waste Agency of Northern Cook County v. Corps of Engineers*, 531 U.S. 159 (2001). The following cases have taken a very broad view of what a tributary is, tracing the tributary far upstream: *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001), and *United States v. Buday*, 138 F. Supp.2d 182 (D. Mont. 2001). Other courts have taken a more narrow view. *See, Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001) and *United States v. Newdunn Associates*, 195 F. Supp.2d 751 (E.D. Va. 2002).

(seasonal) and intermittent streams, and small water segments located great distances from navigable waters.

Petitioners urge this Court to bring clarity by establishing a strict nexus requirement[27] which would have the practical effect of removing many thousands of acres from federal protection. The American Planning Association believes both clarity and the goal of "no net loss" can be achieved by affirming a broad definition of "waters of the United States" which encompasses non-navigable, isolated wetlands. Indeed, it is difficult to imagine how the President's goal of restoring, improving, and protecting the quality and quantity of three million acres of wetlands by 2009 can be achieved without acknowledging the importance of isolated wetlands in meeting that goal.[28]

When isolated wetland resources are identified, categorized and mapped, property owners and regulatory agencies are often able to move beyond the contentious stage where one party is asserting jurisdiction, while the other is hoping to escape regulatory oversight because property owners have greater certainty about how their property can, and cannot, be developed. Early evaluation of potential wetlands is the best way to avoid surprises that can derail a project. Likewise, regulatory agencies have greater clarity about which wetlands they need to focus their attention, staff and fiscal resources on – hopefully resulting in

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[27] Pet. Brief at 34.

[28] On Earth Day 2004, President Bush celebrated the opportunity to move beyond the federal policy of "no net loss" of wetlands and called for a new commitment to attain an overall increase in the quality and quantity of wetlands in America. *Available at* http://www.coastalamerica.gov/News_ release_final.pdf.

more conservation planning with broad public involvement and support.

The private and public sectors can then jointly explore creative solutions to accomplish both development and wetland protection. Encompassing non-navigable and isolated wetlands within the "waters of the United States" will not wipe-out development potential for property owners of such resources because there are many regulatory tools and options available to maximize development potential on such property while protecting the clearly identified wetland resources.

III. Planning And Land Use Regulatory Tools Provide A Range Of Options For Wetland Protection

In most cases, avoiding wetlands is the preferable option for both the property owner and the government. This option is enhanced when wetlands are clearly delineated and mapped. Public-private partnerships to improve wetlands management, which incorporate private stewardship and federal, state and local cooperation, is desirable and feasible. Such a partnership approach to wetlands management can be more flexible in achieving goals than just through reliance on governmental agencies. Partnership arrangements have the potential for developing a broad base of citizen support for wetlands management. By adopting zoning and/or development performance standards for wetlands and adjacent lands, local government can achieve comprehensive wetlands protection that, in many cases, may obviate the need for federal or state permits.

There are a multitude of regulatory tools and options available to the states, local governments, planners and property owners to protect wetlands. Since most wetlands are privately owned, private incentive programs are essential. The Food Security Act of 1985[29] contains a number of incentive programs that foster wetland conservation. These programs have been highly successful in protecting wetlands and should be expanded. The Wetlands Reserve Program[30] (WRP) is a voluntary program offering landowners the opportunity to protect, restore, and enhance wetlands on their property. The USDA Natural Resources Conservation Service (NRCS) provides technical and financial support to help landowners with their wetland restoration efforts. The NRCS goal is to achieve the greatest wetland functions and values, along with optimum wildlife habitat, on every acre enrolled in the program. This program offers landowners an opportunity to establish long-term conservation and wildlife practices and protection.[31]

The American Planning Association believes that the Section 404 protection should be augmented by state legislation and local ordinances, as appropriate, to regulate human-controlled activities which cause adverse impacts to wetlands; to provide protection for isolated wetlands; to strengthen the biological component of the permitting process by recognizing the value of wetlands for wildlife habitat; and to provide incentives to encourage landowners to protect existing wetlands. Local government's role in

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[29] 16 U.S.C. §§ 3801-3862.

[30] 16 U.S.C. §§ 3837-3837f.

[31] *Available at* http://www.nrcs.usda.gov/programs/wrp/ – USDA, Natural Resources Conservation Service.

the federal permit decision-making process needs to be legitimized and federal law should provide the option for local protection to exceed that which is required by federal statutes.[32]

A sound public planning process, along with the adoption of resource conservation plans, should logically precede preparation of regulations. State, regional and local planning activities are important precursors to drafting and implementing effective regulations. Fortunately, a number of innovative land use planning tools have become widely authorized and used around the country to effectively protect isolated and non-navigable wetlands once those resources have been identified and mapped.[33] The days of Euclidean zoning are rapidly fading.[34]

Professor John R. Nolon explains it this way:

> Why the natural landscape tends to be "fractured" is explained, largely, by Euclidean zoning. The layout of zoning districts very seldom has much to do with the topography or boundaries of natural resources. The lines one would draw, for example, to protect a vernal pool habitat or a watershed area would bear little relationship to the development blueprint of the municipal government found in its zoning district map. As important, local zoning

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[32] American Planning Association, POLICY GUIDE ON WETLANDS, ratified by the Board of Directors April 2002. *Available at* http://www.planning.org/policyguides/wetlands.htm [last accessed on December 30, 2005].

[33] *See, e.g.*, McElfish, James M., Jr., NATURE-FRIENDLY ORDINANCES, Environmental Law Institute, 2004.

[34] *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

> often fails to create cost-effective development zones where developers are encouraged to build, where review processes are streamlined, and where infrastructure investments are concentrated.[35]

Planning professionals are taking Ian McHarg's lessons to heart, recognizing that it is critical to have "good" information as the basis for planning and subsequent regulations.[36] Many familiar land use tools (*eg.*, subdivision and zoning) have been refashioned to address the new challenges that communities face with growth and development today; when combined with the appropriate biological and ecological information, these tools can be used to protect and conserve isolated wetlands, while redirecting development to appropriate locations.

A few of these land use tools include:

* Transfer of Development Rights (TDRs) – Development potential can be transferred from one area to another (known as sending and receiving zones) so that property owners in the sending area are compensated for not developing, while development in receiving zones is encouraged. The Long Island Pine Barrens Act of 1993 utilized TDRs, among other things, to protect lands mapped in the Core Preservation Area and transferred that development potential to lands in the Compatible

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[35] Nolon, John R., FLEXIBILITY IN THE LAW: THE RE-ENGINEERING OF ZONING TO PREVENT FRAGMENTED LANDSCAPES, New York Law Journal, February 18, 1998. *Available at* http://www.law.pace.edu/landuse/reengine.html.

[36] McElfish, James M., Jr., NATURE-FRIENDLY ORDINANCES, Environmental Law Institute, 2004, Chapter 3.

Growth Area.[37] On a regional scale, isolated wetlands could be mapped within sending zones if the community or state had a TDR program in place.

* Purchase of Development Rights (PDR) – Very similar in concept to the TDR but instead of transferring development potential from the property to be protected, the development potential is purchased outright.[38] If the government or a land trust wants to purchase the development rights, an independent appraisal is completed to determine the value of the development rights and, upon agreement, a permanent easement is recorded and the development rights are held in perpetuity.

* Wetland Protection Ordinances – Local wetland protection ordinances can require design review, review of grading and building permits, and limit grading and other land disturbance on the wetlands. Local governments can also protect wetlands by locating their infrastructure projects, such as sewage facilities, outside of such areas. Steep slope ordinances prevent grading on hillsides in order to avoid the drainage and run-off into the wetlands. The village of Schaumburg, Illinois, as an example, adopted such a wetland protection overlay district as an amendment to its zoning ordinance.[39]

* Cluster development zoning – Isolated wetlands are often located in the path of new residential subdivisions.

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[37] *Id.* at 87-91, *See also*, Pruetz, Rick, BEYOND TAKINGS AND GIVINGS – SAVING NATURAL AREAS, FARMLAND AND HISTORIC LANDMARKS WITH TRANSFER OF DEVELOPMENT RIGHTS AND DENSITY TRANSFER CHARGES, Arje Press, 2003.

[38] McElfish at 91-95.

[39] McElfish at 118-125.

Rather than scatter new housing units on large, equally-sized lots throughout the subdivision, a community might require the applicant to cluster the same number of housing units closer together on a portion of the property, leaving the remaining acreage undeveloped in its natural state. Calvert County, Maryland adopted such an ordinance in 1993, requiring all subdivisions larger than 20 acres to cluster. Clustering is voluntary on parcels less than 20 acres.[40]

* Floating zones – A floating zone defines a use, such as an office complex, research laboratory, or multifamily housing, that the community wants to encourage. The floating zone ordinance contains a number of provisions intended to mitigate the impact of the development on the surrounding area, including wetlands. Normally for a parcel to be eligible for rezoning under a floating zone, it must be of a sufficient size to insure that the development can be fitted properly into its surroundings.[41]

* Wetland mitigation banking – "In some communities, wetland mitigation banking may be a profitable use for wetland parcels. A wetland mitigation bank is a location that is available to satisfy a requirement under a Section 404 permit for off-site compensatory mitigation. The bank generally is a restored or enhanced wetland (previously degraded in some manner). The developer of a wetland mitigation bank sells credits; purchasers of credits are other persons who are allowed by a Section 404 permit to

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[40] McElfish at 51-55.

[41] Nolon, *supra* note 35.

fill their wetlands if they perform mitigation elsewhere. The mitigation banks can sell credits on the open market."[42]

* Subdivision Regulations – Lot-averaging is "a technique that allows flexibility in lot size and subdivision design while maintaining a desired density. Under lot averaging, the resulting lots may be different sizes and shapes – thus facilitating the protection of natural features – while maintaining a prescribed average density of development."[43] Subdivision regulations can require setbacks of buildings, not only from the lot line but from ecological resources such as wetlands.[44]

* Incentive zoning – Incentive zoning can be used to encourage development in appropriate areas away, for example, from wetlands and other vulnerable resource areas and concentrate development in other districts where it can be properly serviced. In setting up such a system, the existing zoning is left in place, but more intensive development is permitted in exchange for certain community benefits.[45]

Isolated, non-navigable wetlands are facing continued pressure from development and piecemeal efforts to protect these resources. Acknowledging that these wetlands exist, that they require protection, and that the appropriate land use tools are available, will be consistent with our nation's goal of "no net loss."

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[42] Strand, Margaret N. and Lowell Rothschild, *Wetland Basics in the Twenty-First Century*, LAND USE LAW & ZONING DIGEST, Vol. 55, No. 10, American Planning Association, October 2003, at 3-13.

[43] McElfish at 78-79.

[44] *Id.*

[45] Nolon, *supra* note 35.

CONCLUSION

The land use tools exist to address wetland protection in a meaningful way to benefit both the public and the property owner. Isolated, non-navigable wetlands have important ecological functions and benefits which must be preserved and protected. This can only be accomplished if "the waters of the United States" is broadly interpreted.

The American Planning Association urges the Court to acknowledge that isolated wetlands are important wetland resources that require protection under Section 404 that, coupled with the use of appropriate and available land use tools, can help ensure that the nation achieves its long-standing goal of "no net loss."

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